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No. 297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

WALTER J. MILLER,
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Robert E. Albright, on behalf of Walter J. Miller, prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Sixth Circuit, entered on March 22, 1957, affirming a judgment of the United States District Court for the Northern District of Ohio, Western Division, in favor of the United States of America (plaintiff in the District Court) an action for the collection of penalties under the Agricultural Adjustment Act of 1938, as amended, (7 U. S. C. Section 1281, et seq., 52 Stat. 31, et seq.) granting unto the United States of America, a judgment in the amount of $302.40 with costs.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 242 F. Rep. 2d 392, and appears in the appendix, infra, pp. ..... The United States District Court for the Northern District of Ohio, Western Division is not recorded. The court did not render an opinion, but only an order sustaining a motion for summary judgment and granting unto the United States Government a judgment in the amount of $302.40 together with the costs of the action. It appears in the appellants' appendix filed in the United States Court of Appeals for the Sixth Circuit (page 15a, appellant's appendix).

JURISDICTION

The order of the court below (appendix infra, p. 14) was entered on March 22, 1957. The Supreme Court of the United States, upon consideration of the application of counsel for the petitioner, gave an order extending the time to file the petition for writ of certiorari to July 20, 1957. The jurisdiction of the court is invoked under 38 U.S.C.A. 1254.

QUESTIONS PRESENTED

The petitioner was sued for a wheat penalty by the United States of America for excess wheat upon his farm under the provisions of 7 U.S.C.A. 1281, et seq., 52 Stat. 31, et seq. The complaint is set forth in pages 2a, 3a, 4a, 5a, 6a of the appellant's appendix. The petitioner filed an answer alleging certain affirmative defenses and a request for a trial by jury (pages 6a, 7a, 8a, appellant's appendix).

The complainant moved and was granted a summary judgment. The questions presented in this petition are:

1. Is a wheat penalty, as such, when sought by court proceedings a "forfeiture of property" as set forth in Rule 81 of the Federal Rules of Civil Procedure?

2. Does a defendant in an action for a wheat penalty have a right to a jury trial when his answers set forth affirmative defenses?

3. Is the Agricultural Adjustment Act of 1938, as amended (7 U.S.C.A. 1281, et seq., 52 Stat. 31, et seq.), applicable to a farmer who has not been nor has ever been, in regards to wheat, engaged in interstate commerce or affecting the same, either directly or indirectly and who has never accepted any benefits either directly or indirectly under the act?

4. Is the application of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C.A. 1281, et seq., 52 Stat. 31, et seq.), to a farmer who is not engaged in interstate or foreign commerce or who does not affect either directly or indirectly, interstate or foreign commerce in regards to wheat, a denial of due process of law?

STATUTES INVOLVED.

The Agricultural Adjustment Act of 1938, as amended (7 U.S.C.A. 1281, et seq., 52 Stat. 31, et seq.), provides in pertinent part:

"7 U.S.C.A. Sec. 1340

"(1) The farm marketing quota under the Act for any crop of wheat shall be the actual production of the acreage planted to wheat on the farm, less the normal production or the actual production, whichever is the smaller, of that acreage planted to wheat on the farm which is in excess of the farm acreage allotment

for wheat. The farm marketing quota under the Act for any crop of corn shall be the actual production of the acreage planted to corn on the farm, less the normal production or the actual production, whichever is the smaller, of that acreage planted to corn on the farm which is in excess of the farm acreage allotment for corn.

"The normal production, or actual production, whichever is the smaller, of such excess average is hereinafter called the 'farm marketing excess' of corn or wheat, as the case may be. For the purposes of this resolution, 'actual production' of any number of acres of corn or wheat on a farm means the actual average yield of corn or wheat, as the case may be, for the farm times such number of acres.

"(2) During any marketing year for which quotas are in effect, the producer shall be subject to a penalty on the farm marketing excess of corn and wheat. The rate of the penalty on wheat shall be 45 per centum of the parity price per bushel of wheat as of May 1 of the calendar year in which the crop is harvested.

"(3) The farm marketing excess for corn and wheat shall be regarded as available for marketing, and the penalty and the storage amount or amounts to be delivered to the Secretary of the commodity shall be computed upon the normal production of the excess acreage. Where, upon the application of the producer for an adjustment of penalty or of storage, it is shown to the satisfaction of the Secretary that the actual production of the excess acreage is less than the normal production thereof, the difference between the amount of the penalty or storage as computed upon the basis of normal production and as computed upon the basis of actual production shall be returned to or

allowed the producer. The Secretary shall issue regulations under which the farm marketing excess of the commodity for the farm may be stored or delivered to him. Upon failure to store or deliver to the Secretary the farm marketing excess within such time as may be determined under regulations prescribed by the Secretary, the penalty computed as aforesaid shall be paid by the producer. Any corn or wheat delivered to the Secretary hereunder shall become the property of the United States and shall be disposed of by the Secretary for relief purposes in the United States or in foreign countries or in such other manner as he shall determine will divert it from the normal channels of trade and commerce.

"(4) Until the producers on any farm store, deliver to the Secretary, or pay the penalty on, the farm marketing excess of any crop of corn or wheat, the entire crop of corn or wheat, as the case may be, produced on the farm shall be subject to a lien in favor of the United States for the amount of the penalty.

"(5) The penalty upon corn or wheat stored shall be paid by the producer at the time, and to the extent, of any depletion in the amount of the commodity so stored, except depletion resulting from some cause beyond the control of the producer.

"(6) Whenever the planted acreage of the then current crop of corn or wheat on any farm is less than the farm acreage allotment for such commodity, the total amount of the commodity from any previous crops required to be stored in order to postpone or avoid payment of penalty shall be reduced by that amount which is equal to the normal production of the number of acres by which the farm acreage allotment exceeds

the planted acreage. The provisions of section 326 (b) and (c) of the Act shall be applicable also to wheat.

"(7) A farm marketing quota on corn or wheat shall not be applicable to any farm on which the acreage planted to the commodity is not in excess of fifteen acres. The marketing penalty on corn or wheat shall not be applicable to any farm which, under the terms of the then current agricultural conservation program formulated under sections 7 to 17, inclusive, of the Soil Conservation and Domestic Allotment Act, is classified as a nonallotment farm if the acreage of the commodity harvested on such nonallotment farm is not in excess of fifteen acres or the acreage allotment for the farm, whichever is larger. If the acreage of the commodity harvested on any such nonallotment farm is in excess of fifteen acres and in excess of such acreage allotment, the normal production or the actual production, whichever is the smaller, of the acreage harvested in excess of fifteen acres or such acreage allotment, whichever is larger, shall be taken as the farm marketing excess and shall be subject to penalty: Provided, That there shall be no penalty on wheat harvested on any such nonallotment farm from which no wheat is sold if the acreage of wheat harvested on such farm does not exceed such acreage per family living thereon as may be used for home consumption without reducing the payment with respect to the farm under the then current agricultural conservation program: Provided further, That for the marketing year beginning in 1941, there shall be no marketing penalty on wheat with respect to any such nonallotment farm if the acreage of wheat harvested on the farm is not in excess of the usual acreage determined for the farm under the 1941 agricultural conservation program and the county committee determines, in ac-

cordance with regulations of the Secretary, that there will not be marketed an amount of wheat in excess of the 1941 farm marketing quota.

"(8) Until the farm marketing excess of corn or wheat, as the case may be, is stored or delivered to the Secretary or the penalty thereon is paid, each bushel of the commodity produced on the farm which is sold by the producer to any person within the United States shall be subject to the penalty as specified in paragraph (2) of this resolution. Such penalty shall be paid by the buyer, who may deduct an amount equivalent to the penalty from the price paid to the producer.

"7 U.S.C.A. 1375

"(a) The Secretary shall provide by regulations for the identification, wherever necessary, of corn, wheat, cotton, rice, peanuts, or tobacco so as to afford aid in discovering and identifying such amounts of the commodities as are subject to and such amounts thereof as are not subject to marketing restrictions in effect under this title. (7 U.S.C.A. 1375(a)

"(b) The Secretary shall prescribe such regulations as are necessary for the enforcement of this title." (7 U.S.C.A. 1375(b)

"7 U.S.C.A. 1376

"The several district courts of the United States are hereby vested with jurisdiction specifically to enforce the provisions of this title. If and when the Secretary shall so request, it shall be the duty of the several district attorneys in their respective districts, under the direction of the Attorney General, to institute proceeding to collect the penalties provided in this title. The remedies and penalties provided for herein shall be

in addition to, and not exclusive of any of the remedies or penalties under existing law. (7 U.S.C.A. 1376)."

CONSTITUTIONAL PROVISIONS

Article I, Section 8. The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

AMENDMENT (V)

Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (VII)

Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

BASIS FOR FEDERAL JURISDICTION OF THE FEDERAL DISTRICT COURT

The jurisdiction of the United States District Court of the United States for the Northern District of Ohio over this proceedings is given under the provisions of Section 376 of the Act (7 U.S.C.A. 1376), and title 28 United States Code Section 1345.

STATEMENT OF CASE

This petition seeks a review upon the constitutionality of the Agricultural Adjustment Act of 1938 as amended, in regards to the collection of penalties, procedure for collection of penalties and the right of jury trial to determine affirmative defenses; and the denial of due process in regards to such action for collection in relation to farmers, who, upon the facts in the case were not engaged, either directly or indirectly in interstate or foreign commerce nor affecting the same.

REASON FOR GRANTING THE WRIT

The Court should grant a review on certiorari for the following reasons:

1. A review of this case would decide an important question of federal law which has not been, but should be settled by this court.

2. The Federal Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions by this court.

The Court of Appeals cited *National Lawyer's Guild v. Brownell*, 225 Fed. (2d) 552 C.A.D.C. as authority that the District Court as well as the Circuit Court of Appeals

were deprived of jurisdiction because the defendant failed to exhaust his administrative remedies. This is a mistaken application of the rule of exhaustion of administrative remedies for the following reason:

1. The defendant, Miller, did not bring this action, the United States of America was the moving party.

2. The case cited above by the court was one where the National Lawyer's Guild sought to enjoin the United States Attorney General. The Guild was the moving party who had failed to exhaust its administrative remedies.

If, as the Court of Appeals asserts, the District Court had no jurisdiction, then how was it able to render a judgment against the defendant? Does it have a percentage-wise jurisdiction? Such a thing is in itself preposterous, in that it either has jurisdiction or it does not have jurisdiction.

The United States of America sued the defendant in this case and the question of the constitutionality of the statute was raised in the defendant's answer, page 6a, and 7a, appellant's appendix. It was specifically raised by the defendant's answer.

The defendant, Miller, had no other opportunity in this case to raise a constitutional question until sued by the government and he promptly and fully raised this issue at that time. If the defendant had attempted to raise the question as a moving party, we would have something similar to the case of *Wickard v. Filburn*, 317 U. S. 111.

3. When a penalty is attempted to be imposed and collected from an individual by a governmental agency through court proceedings a defense of unconstitutionality of the particular act under which the penalty is sought may always be raised at such time by the individual. This to the petitioner seems to be basic constitutional law taught to freshman law students and has been adopted by con-

stitutional students since time immemorial. The rule of exhaustion of administrative remedies in such a case has no applicability and is not in point in the case before the court.

The case of *Wickard v. Filburn*, 317 U. S. 111 is cited as authority for the constitutionality of the act as applied to this defendant. This case is not in point and petitioner will set forth the reasons for the inapplicability of that decision to this case.

Wickard v. Filburn as distinguished from *U. S. v. Miller.*

1. In the *Wickard* case the moving party was the farmer. In the *Miller* case it was the government suing to collect a penalty.

2. In the *Wickard* case the farmer sought to enjoin the enforcement of the act to himself. In the *Miller* case the defendant Miller is being sued for a money judgment or penalty by the government for violation, so called, of a federal statute.

3. In the *Wickard* case a stipulated set of facts were agreed upon by the parties. In the *Miller* case, the defendant, Miller, denied essential facts and requested a trial by jury (appellant's appendix, page 8a) which was denied by a granting of a summary judgment under Rule 56 of the Federal Rules of Civil Procedure by the District Court.

4. In the *Wickard* case the farmer sold his wheat (page 114 of opinion). In the *Miller* case the farmer did not sell his wheat nor did not engage in interstate or foreign commerce, directly or indirectly.

5. In the *Wickard* case the farmer also fed to livestock, for sale, etc. In the *Miller* case the defendant did not engage, even indirectly in interstate or foreign commerce.

6. In the *Wickard* case the farmer had accepted benefits under the act previously. In the *Miller* case no benefits were ever accepted, either directly or indirectly by Miller.

Never in the history of this court has the court settled the question involved in this case. In no case where a farmer has been sued for a penalty by the government under the Agricultural Adjustment Act for the raising of wheat and the farmer denies that he is engaged in interstate or foreign commerce and requests a trial by jury has ever been before this court. The *Wickard* case was an injunctive action sought by the farmer and is not in point.

Over 400 farmers in Ohio alone have been sued for penalty by the government. The defendants in many of these cases are factually in the same shoes as Miller. It would benefit both the government and the farmers, for the court to settle the rights of the parties to such a controversy. Much time, money and effort could be saved and justice preserved if the court would settle the rights of the parties to such an action. On the side of the government, if the court saw fit to rule for them, they could cite as a final and settling authority to the question raised in these cases. On the side of the individuals, they could be saved time, money and the effort of employment of counsel with expenses in the filing of briefs, etc., prior to reaching this court.

In the case before the court, we must accept the facts as shown by the pleadings upon which the District Court granted a summary judgment. If under such facts, the government can recover a judgment as an application of the Agricultural Adjustment Act, then the act itself is unconstitutional and this petitioner sincerely believes such. Neither the Court of Appeals or the government has ever cited a case where this court has decided the issues in this case. This alone should be sufficient for a review by this court of the questions involved.

A review of every decision cited in the case of *Wickard v. Filburn* reveals that none are applicable to the case

before this court. Here the defendant raises affirmative defenses and in his answer asserts that he is not engaged either directly or indirectly in interstate commerce and requests a trial by jury. *Wickard v. Filburn* does not decide the issues in this case. It is basic constitutional law that the court, in determining the constitutionality of an act as in *Wickard v. Filburn*, does not go beyond the facts presented to determine the constitutionality of a statute. The facts in *Wickard v. Filburn* case cannot, therefore, be controlling on the petitioner's case as they are not the same.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

ROBERT E. ALBRIGHT,
Attorney for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WALTER J. MILLER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Before: Frank L. Kloeb, Judge.

Order Sustaining Motion for Summary Judgment

(Filed January 19, 1956)

This day this cause was submitted to the court upon the motion of the plaintiff, pursuant to Rule 56 of the Rules of Civil Procedure, for summary judgment in the plaintiff's favor, and upon the briefs of the parties, and upon consideration thereof, the court sustains such motion.

It is, therefore, ordered that judgment be entered for plaintiff in the sum of $302.40, together with the costs of this action.

APPENDIX B.

Opinion

(Decided March 22, 1957.)

Before SIMONS, Chief Judge, ALLEN and STEPHENS,* Circuit Judges.

ALLEN, Circuit Judge. This action was instituted for the purpose of collecting penalties under the Agricultural Adjustment Act of 1938 as amended, 7 U. S. C. Section

*Albert Lee Stephens of the Ninth Circuit.

1281, et seq. On motion of the Government the District Court granted summary judgment against defendant[1] in the amount of $302.40 with costs.

Two principal questions are presented: (1) Whether the action for penalties is quasi-criminal and hence the summary judgment procedure available under Rule 56 of the Federal Rules of Civil Procedure is not available here; (2) whether defendant's failure to apply for his administrative remedies precludes him from challenging the determination of the farm marketing quota and the farm marketing excess, and from raising constitutional questions.

As to the first contention, under Rule 81 (a) (2) the Federal Rules of Civil Procedure are applicable only on appeal where there is a "forfeiture of property for violation of a statute of the United States." Defendant admits in interrogatories that he did not pay the amount of the wheat marketing quota penalty established for his farm, and that he did not deliver any of the wheat grown on the farm to the Secretary of Agriculture as provided in the statute. Defendant claims that, if the judgment is sustained, his property is forfeited or confiscated. In support of his contention that the Federal Rules of Civil Procedure do not apply and that summary judgment was illegally entered, defendant cites *United States* v. *Solomon*, 3 F. R. D. 411, which held that, in an action for penalties arising under the Perishable Agricultural Commodities Act, 7 U. S. C. Section 499a et seq., for carrying on the business of handling perishable commodities without a license from the Secretary of Agriculture, the court would disregard evidence obtained when the Government called defendant for cross-examination as an adverse

[1] Appellant will be called defendant and appellee the Government throughout this opinion.

party under the Federal Rules of Civil Procedure. Both the statute there involved and the factual situation presented are totally different from those of the instant case. The *Solomon* decision has been criticised as unsound in Moors's Federal Practice, 2nd edition, Volume 2, page 12.

The *Solomon* case in turn relies upon *Boyd* v. *United States*, 116 U. S. 616, which declares that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal." The *Boyd* case was decided in 1886, over fifty years before the enactment of the Agricultural Adjustment Act (1938). The statute there provided for a forfeiture for fraudulent importation of goods and authorized compulsory production of defendant's private papers. This provision was held unconstitutional Plainly the decision has no bearing here.

The Agricultural Act provides not for "forfeiture" but for a money judgment for the penalties established for noncompliance. Under the Act a producer's overproduction of wheat contrary to the allotments made by the Secretary of Agriculture and by the County Committee is not invested with a criminal character. It is not a crime to produce in excess of the marketing quota. *Usher* v. *United States*, 146 Fed. (2d) 369, 371 (C. A. 4). In fact, a producer may grow whatever quantity of wheat he wishes, provided he pays the civil penalty. *Usher* v. *United States*, *supra*. Neither is the marketing of wheat in excess of the quota prohibited. The purpose of requiring the penalties was not to raise revenue for the government but to discourage the planting and marketing of more than the quotas established. *Rodgers* v. *United States*, 332 U. S. 371, 374. These circumstances demon-

strate that the action for penalties under the Agricultural Adjustment Act is neither criminal nor quasi-criminal.

In recent years the courts have been reluctant to hold, even in cases of seizure and condemnation of property for violation of statute, that criminal and not civil procedure applies. *Alberty Food Products Company* v. *United States*, 185 Fed. (2d) 321, 326 (C. A. 9), decided that summary judgment may be entered in a case under the Federal Food, Drug, and Cosmetic Act as soon as the property has been seized. Cf. *United States* v. *Five Cases*, 179 Fed. (2d) 519 (C. A. 2). Clearly if the civil summary judgment procedure is available under Rule 56 after property has been seized under a statute providing for forfeiture it should be available here where no seizure or forfeiture is authorized by the Agricultural Adjustment Act and where only money judgment is sought. *Colusa Remedy Company* v. *United States*, 176 Fed. (2d) 554 (C. A. 8), held that a proceeding to forfeit and condemn property for violation of a federal statute which does not involve the personal conviction of the wrongdoes of the offense charged is one of a civil and not a criminal nature. To the same effect see *Dobbins's Distillery* v. *United States*, 96 U. S. 395, 399; *United States* v. *935 Cases More or Less*, 136 Fed. (2d) 523, 526, (C. A. 6). On the assumption that there was no genuine issue of a material fact, the court did not err in rendering summary judgment.

Defendant claims that genuine and material issues of fact were raised by interrogatories as to the establishment and validity of the farm marketing quota and of the farm marketing excess of wheat for defendant's farm, that these interrogatories were not answered and that the summary judgment must therefore be reversed.

Defendant failed to apply for, much less exhaust, his administrative remedies. Hence, he cannot raise these questions here. He could have asked the Secretary for a downward adjustment in the amount of the farm market excess. 7 U. S. C. Section 1340(12). He could have applied to have the farm marketing quota reviewed by a local review committee. Section 1363. He could have filed a bill in equity in the United States District Court or could have instituted proceedings for review in a state court of record. Section 1365. The statute specifically provides that, unless application for review is made within the time limited, the original determination of the farm marketing quota shall be final. 7 U. S. C. Section 1367 provides that the determination of the committee is exclusive and that, except under the statute, no court of the United States shall have jurisdiction to pass upon the legal validity of any such determination.

The farm marketing quota is necessarily based upon the determination of the farm marketing excess; hence, the validity of the County Committee's determination of the quota depends upon its determination of the farm marketing excess. This decision is compelled by the history of the legislation. The Act of May 26, 1949, 55 Stat. 203, 7 U. S. C. Section 1340, amended the statute to provide specifically for the determination of the farm marketing excess by the County Committee. As declared by the United States Supreme Court in *Markham* v. *Cabell*, 326 U. S. 404, 411, "the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole." It follows that the Congress intended that the administrative review provisions of the Act which were retained by subsequent amendment, 65 Stat. 31, 7 U. S. C. Section 1363, should be

enforced for the determination of the farm marketing excess. Moreover, the regulation [19 F. R. 205, Section 728.465(a)] issued by the secretary under authority of the statute expressly provides that the determination of the administrative officials shall be final, both as to the quota and as to the farm marketing excess unless application for review is made. Since this regulation is in conformity to the statute it has the force and effect of law.

It is unnecessary to cite the countless decisions with reference to the rule of exhaustion of administrative remedies and its application to the finality of determination. The doctrine applies to a remedy provided by regulation as well as by statute. *National Lawyers' Guild* v. *Brownell*, 225 Fed. (2d) 552 (C. A. D. C.). The District Court and this court are deprived of jurisdiction by defendant's faliure to seek review. 7 U. S. C. Section 1367. Moreover, defendant's inaction precludes him from raising his constitutional questions, for these questions clearly bear upon the "legal validity" of the determinations. 7 U. S. C. Section 1367. If defendant were enabled to assert the extensive constitutional points which he raises, we think many of them have in effect been disposed of by the Supreme Court in *Wickard* v. *Filburn*, 317 U. S. 111, cited and approved in *Maneja* v. *Waialua Agricultural Company, Ltd.*, 349 U. S. 254, 259. In light of these decisions, as to the constitutional questions defendant's remedy, if any, may be legislative rather than judicial.

The judgment of the District Court is affirmed.

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vs.

UNITED STATES OF AMERICA,
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REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE MUMMA CASE IS NOT APPLICABLE TO THE PETITION AT BAR.

Counsel for the United States cite the case of *Mumma v. United States*, 352 U. S. 1003, stating that the court denied a petition for writ of certiorari in 1956, which case asked the court to overrule *Wickard v. Filburn*. This implies that the same question was raised as in the present petition before the court. The case however can clearly be distinguished from the present case before the court and the following, only too obvious, distinctions are noted:

1. The answer filed by the defendant in the *Mumma* case alleged no affirmative defenses, as in the case presently before the court: The Honorable Judge Follmer, District Judge, United States Court for the Middle District of Pennsylvania in his opinion, stated as follows:

> "The best that can be said for the answer and the affidavits is that they contain mere formal denials and general allegations without showing any facts in detail or with precision to prevent such a summary judgment".

2. The petition for writ of certiorari filed in the *Mumma* case presented eight (8) questions to the Supreme Court. None of the questions which were presented in that case are before the court in the present petition for writ of certiorari. In truth and in fact, there is no similarity whatsoever in the questions presented.

The government, in its brief in opposition, cites merely two questions as being presented in this case when there are really four before the court. We feel that there is no need to reiterate them but the petitioner would like to emphasize the following, deleted from the questions presented by the brief in opposition. The changing of the wording by the government is not the questions presented. The questions presented in question No. 3 was "Is the Agricultural Adjustment Act of 1938, as amended (7 USCA 1281 et seq., 52 Stat. 31 et seq.) applicable to a *farmer who has not been nor has ever been in regard to wheat, engaged in inter-state commerce or affecting the same, either directly or indirectly and who has never accepted any benefits either directly or indirectly under the act.*" The narrow question as to whether he has or has not marketed wheat was not the issue raised by the affirmative defenses in the answer filed by the defendant in this case. The petitioner herein, has specifically, by affirmative defenses, denied that he, in regards to wheat, was engaged

in interstate commerce or affected the same directly or indirectly and that he never accepted any benefits.

The brief in opposition of the petition states that the court's opinion in the *Wickard* case does not even mention past acceptance of benefits under the act. The Supreme Court concluded its decision in *Wickard v. Filburn* as follows:

> "That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law."

This language in itself would show that the court concluded and found from the facts in the case that the appellee in the case had received benefits under the act and in fact received direct benefits. This is not the case before the court in the petitioner's facts. Miller had received no benefits either directly or indirectly.

The brief in opposition to the petition for writ of certiorari contends that the facts in the case were not the basis for the court's decision and, in effect, the court gave what would be called "an advisory opinion" as to the overall constitutionality of the Act, based upon any set of facts. This has never been done in the history of the Supreme Court and it likewise is true in *Wickard v. Filburn*. The government attorneys would have us believe that the case of *Wickard v. Filburn* should be cited as a decision of this court resolving any set or circumstance of facts with regard to the applicability or constitutionality of 7 U. S. C. 1281 et seq. commonly known as the Agricultural Adjustment Act of 1938, as amended. This has not, cannot, and should not be so.

One of the important factors decided in *Wickard v. Filburn* as to the farmer in the case was that there was a

contribution by the farmer towards the wheat in interstate commerce, though it was trivial. In the *Miller* case, there was no contribution, trivial or otherwise by Mr. Miller of his wheat as to interstate commerce. This was raised by affirmative defense of Miller in his answer to the complaint of the government.

The Proposition That Petitioner's Failure to Exhaust Administrative Remedies Precludes Raising Constitutional Questions in the Case at Bar is Not Tenable.

The Court of Appeals refused to consider the constitutional question raised by defendant because of defendant's alleged failure to apply for and exhaust his administrative remedies. (Pet. 18-19). The court goes so far as to say that this alleged failure actually deprived the District Court of jurisdiction to determine any constitutional questions which defendant seeks to raise. Defendant contends that he has raised the constitutional question at the earliest possible time and the District Court in this case was the only forum in which such question could be properly raised.

We now make a cursory review of the specific code sections which the Court of Appeals cited as constituting the administrative remedies which defendant should have pursued on his constitutional question. (Pet. 18-19)

The court refers to 7 U. S. C. Section 1340 (12), the relevant portion of which follows:

> (12) "Notwithstanding the foregoing provisions, the farm marketing excess for any crop of wheat for any farm shall not be larger than the amount by which the actual production of such crop of wheat on the farm exceeds the normal production of the farm wheat acreage allotment, if the producer establishes such actual production to the satisfaction of the Secretary."

The secretary's jurisdiction under this section is limited to the determination of a specific fact. The constitutional question is hardly within the scope of this section.

The court next referred defendant to 7 U. S. C. Section 1363. The pertinent part of this section is as follows:

> "Any farmer who is dissatisfied with his farm marketing quota may, within 15 days after mailing to him a notice as provided in Section 1362 of this title, have such quota reviewed by a local review committee composed of three farmers appointed by the Secretary".

It is obvious that the jurisdiction of this committee is limited to a review of the determination of the farm marketing quota. This view is supported by the case of *Smith Land Co. v. Christensen, et al.*, 148 F. 2d. 184, and the court stated:

> "The review committee did not have anything to do with the imposition of the penalty or the release of it. That was entirely beyond the duties and function of the committee."

The determination of the farm marketing quota for wheat consists of the application of a mathematical formula determined by the law (7 U. S. C. Section 1335 (c), 1340 (1)) applied to the farm acreage allotment determined by the secretary through local committees (7 U. S. C. Section 1334 (6)). The statute gives the review committee nothing more to do than to review the accuracy of this determination in accordance with the law and regulations. Is this then the point where defendant should have asserted his constitutional rights? Are we to assume that the constitutional question is to be determined by a committee of three farmers? There is nothing here to indicate that Congress intended to confer such jurisdiction upon this review committee. It goes without saying that to have done so would have been an unconstitutional delegation of judicial power and this should never be presumed.

The court then suggests that the remedy for constitutional relief might have been sought under 7 U. S. C. Section 1365. A pertinent portion of this code section is as follows:

> "If a farmer is dissatisfied with a determination of the review committee, he may, within 15 days after a notice of such determination is mailed to him by registered mail, file a bill in equity against the review committee as defendant in U. S. District Court or institute proceedings for review in any court of record of the state having general jurisdiction, sitting in the county of the district in which his farm is located, for the purpose of obtaining a review of such determination."

It is obvious that this section provides only for a review of proceedings within the jurisdiction of the review committee. It would stretch the imagination to hold that this section was intended to give the reviewing court jurisdiction over matters not properly before the lower tribunal. In other words, if the farmers are given no jurisdiction in 7 U. S. C. Section 1363 to determine constitutional questions, then the court in the particular proceedings provided in 7 U. S. C. Section 1365 is given no such jurisdiction.

A study of 7 U. S. C. Section 1366 which sets forth the duties of the reviewing court in this situation adds support to petitioner's contention. The court is clearly limited to consideration of the evidence presented to the review committee, either in its original proceedings, or in supplemental proceedings, if it is shown that "such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the review committee". It is obvious that even this additional evidence is merely evidence germane to the limited issue before the review committee, namely the determination of the farm marketing quota. Any further evidence germane to the constitutional issue but not per-

tinent to the quota could not be presented to the court under 7 U. S. C. Section 1366. The court is expressly limited to the original record and the supplemental record of the board of review.

Furthermore, the disposition of this proceeding which the court is directed to make eliminates the possibility that Congress intended the constitutional question to be raised at this point. 7 U. S. C. Section 1366 provides as follows:

> "If the court determines that such determination or modified determination is not in accordance with law, the court shall remand the proceeding to the review committee with direction either to make such determination as the court shall determine to be in accordance with law or to take such further proceedings as in the court's opinion, the law requires."

Obviously, it is intended here that the court, if dissatisfied, will remand the case for further calculations regarding the farm marketing quota. The court has only two choices under this statute. It may affirm or it may remand to the committee. If, however, the court were given jurisdiction of a constitutional question in this proceeding it would have to have three choices—to affirm, to remand, or if the action of the review committee were unconstitutional, to enter final judgment for the petitioner. But the statute does not contemplate the latter possibility. If the court decided an appeal on the constitutional question, it would not make sense to remand the proceeding to the three farmers with the direction for them to find the farm marketing quota unconstitutional. Yet if we assume the court has the constitutional jurisdiction, this would have to be the procedure according to the language of 7 U. S. C. Section 1366. The closer we study Section 1366, the more obvious it becomes that the review jurisdiction granted to the court is very limited, so limited that it precludes the determination of a constitutional question.

There is nothing in these code sections cited by the Court of Appeals to indicate that all evidence regarding issues of fact pertinent to constitutional rights must either be presented to the committee of three farmers or the right is waived. Certainly we should not presume that Congress intended such an unusual expansion of judicial power. Any reference in 7 U. S. C. Section 1367 to the "legal validity" of the review committee's determination must in the light of the foregoing code sections, be construed as meaning its validity as determined by the statutes and regulations and not by the United States Constitution.

The principal question is not whether Congress could have vested jurisdiction to determine constitutional questions in a committee of farmers but whether in fact it did. We think that it did not.

Therefore, the statement by the Court of Appeals that defendant is precluded from raising his constitutional questions in the present proceedings is completely without merit.

Another reason why the petitioner should be permitted to raise the constitutional question at the time when he did so, is that some of the evidence highly material to the constitutional question, was not germane to the issues before the administrative bodies.

This evidence concerns the disposition of the 1954 wheat crop. According to the evidence in the record, this wheat was stored. It was not placed on the market. It was not fed to animals which were placed on the market. It was in storage on the defendant's farm from the time it was harvested until the time the complaint was filed on September 15, 1955, and the issues in this proceeding were joined.

The facts regarding disposition of the wheat, which defendant will urge in support of his constitutional argument, were not germane to the issues at any of the administrative

hearings available to defendant prior to the hearing on the complaint. The reviews of the determination of marketing quota or marketing excess provided by the statute have nothing to do with the current location or disposition of the harvested wheat at the time of such review. The factual scope of this jurisdiction is limited just as the jurisdiction of legal questions.

It was only at the time the defendant was charged with a penalty for violating the law that the location and disposition of the wheat from harvest to the time the complaint was filed could be placed in evidence to show that at no time prior to the complaint had the defendant done any act which would make him subject to the law. The application of the law to the facts as they existed at the time the complaint was filed is the question defendant is raising in these proceedings.

In short, defendant contends that where his defense is that he has done no act which would make him subject to the law, he is entitled to place in issue all evidence regarding his activities prior to the date the law's sanction was invoked.

Both the United States Constitution and Rule 81 of the Federal Rules of Civil Procedure Bar the Granting of a Summary Judgment Where Forfeiture of Private Property For Violation of a Criminal or Quasi-Criminal Statute is Involved.

It is the contention of the attorneys for the Federal Government (and the summary action of the District Court and the upholding of said action by the Court of Appeals sustains said contention) that Congress, *acting under the Commerce Clause* in the United States Constitution can:

1. Delegate to the Secretary of Agriculture the power to appropriate usufruct of a farmer's land by predetermin-

ing what portion of said land he may use and by then summarily confiscating the harvest from land used in excess of said determination.

2. Deprive a citizen of his right to trial by jury upon an attempted confiscation of his private property as a sanction for violating a federal edict, by merely saying "this is a civil sanction."

3. By administrative procedure prescribed for the enforcement of an Act, completely deprive a citizen of his right to raise objection to the constitutionality of said Act as applied to him when the first opportunity for raising said objection before a competent judicial body has been presented.

In arguing against allowance of appellant's petition for a writ of certiorari, attorneys for the government assert that the petitioner's affirmative defense (that he had not marketed any part of his wheat in interstate commerce) raises an immaterial issue and lays no basis for trial by jury. It is respectfully submitted, however, that every allegation which attacks the constitutionality of the Act sought here to be enforced against petitioner and which affirmatively denies commission of acts which would make the Act and the regulatory power of Congress applicable to him, raises a material issue. Although attorneys for the government see no distinction between the *Wickard* case and the case at bar, the appeal of a citizen to the judicial branch of his government for protection of his personal and property rights from confiscation certainly requires that the judiciary give pause and examine whether a criminal sanction is sought to be imposed, and whether the situation in such a case is the same as presented in the *Wickard* case. The rationale of the Court of Appeals on this point, as evidenced by its opinion, clearly demonstrates a complete failure on the part of the lower court to examine

into this question. The Court of Appeals in its opinion states "the Agriculture Act provides not for 'forfeiture' but for a money judgment for penalties established for non-compliance." What, pray tell, is the difference between forfeiting one's property for failure to obey an edict and paying a money fine (as a substitute for forfeiture) for failing to obey said edict? The court further states "it is not a crime to produce in excess of the marketing quota * * * in fact, a producer may grow whatever quantity of wheat he wishes, *provided he pay the civil penalty*". What nature of right is this, that its exercise bears the onus of a penalty? The court might as well say a man is free to kill any one he chooses, provided he pays the penalty. The court further states that "the purpose of requiring the penalties was not to raise revenue for the government but to *discourage the planting and marketing of more than the quotas established*." Does not depriving a citizen of the use of his land clearly entail a taking of private property without compensation?

Counsel for petitioner are convinced that the protection afforded every citizen by the United States Constitution clearly preclude the summary action taken in this case. Irrespective, however, of said constitutional safeguards it is difficult for petitioner's counsel to understand how the court can ignore the express provisions of Rule 81 of the Federal Rules of Civil Procedure, particularly in view of this court's ruling in the case of *Boyd v. The United States*, 116 U. S., 616, 6 S. C., 524, 29 L. Ed., 746, followed in the case of *United States v. Solomon*, 3 F. R. D., 411. The court, in the *Solomon* case stated that

> "It is quite clear that the penalties * * * are meant to be and operate as a punishment for violation of the law and though such penalties are to be recovered in the civil suits, such suit though civil in form, is not 'of a civil nature' to which the federal rules of civil procedure are limited, but of a criminal or quasi-

> criminal nature. Wherefore, under the terms of said Rule 1, a suit for penalty such as that before the court is not within the scope of the rule."

The pronouncement of the Supreme Court as explained in the *Solomon* case should settle the procedural question raised in this case but both the District Court and the Court of Appeals have sought to avoid it by stating that the case does not involve a forfeiture of property. From the vantage point of petitioner's counsel, however, it is patent on its face that *forfeiture is involved* and that not only is Rule 81 here applicable, but that even without said rule, neither the federal courts, Congress nor the executive department can *confiscate* a citizen's property without affording him his day in court to question the basis upon which such confiscation is founded. This basic concept of "due process of law" appears so exasperatingly clear that the necessity of having to carry the question all the way to the Supreme Court of the land for final resolution can hardly be described as anything other than utter frustration.

Attorneys for the government argue that petitioner, having failed to pursue his administrative remedies respecting the determination of his farm marketing quota, cannot, in this action, attack the validity of the determination. The lower courts agreed with such argument. The position of the petitioner is that he is not now, never has been before, and cannot be required to pursue administrative remedies affecting legislation which is, itself, unconstitutional and that his failure to follow said administrative remedies cannot deprive him of the right to raise the question of said unconstitutionality before a competent judicial tribunal. The Court of Appeals stated that

> "the District Court and this court are deprived of jurisdiction by defendant's failure to seek review * * * Moreover, *defendant's inaction precludes him for rais-*

ing his constitutional question for these questions clearly bear upon the 'legal validity' of the determinations."

Counsel for petitioner respectfully submits that if the right of a citizen to question the constitutionality of legislation can be lost before he ever has the opportunity to exercise it before the judicial branch of his government, it will only, of necessity, be because the judiciary joins with the legislative and the executive branches in declaring that said right does not exist in the first instance. Surely, such is not the case! Despite the pronouncement of the Court of Appeals in the last paragraph of its opinion, defendant's remedy *as to constitutional questions* is, of necessity, to the judicial rather than the legislative.

In their argument government attorneys quote from the *Wickard* case the language that

> "the fact that the production of a particular farmer 'may be trivial by itself is not enough to remove him from the scope of federal regulation where, *as here, his contributions*, taken together with that of many others similarly situated, is far from trivial.'".

Petitioner has consistently argued that his situation is different than that of Mr. Filburn and that the court, in deciding said case, considered the particular situation of Mr. Filburn. Such conclusion is inescapable and no amount of generalization by government attorneys can deny said fact. The situation in the *Wickard* case is just not applicable to the case at bar!

SUMMARY.

In summary, petition states that:

1. The *Mumma* case is not applicable to the petition at bar;

2. The proposition that petitioner's failure to exhaust administrative remedies precludes raising constitutional questions in the case at bar is not tenable, and

3. Both the United States Constitution and Rule 81 of the Federal Rules of Civil Procedure bar the granting of a summary judgment where forfeiture of private property for violation of a criminal or quasi-criminal statute is involved.

Counsel for petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT E. ALBRIGHT,
Attorney for Petitioner.

No. 297

In the Supreme Court of the United States

October Term, 1957

WALTER J. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. 14-19) is reported in 242 F. 2d 392. The United States District Court for the Northern District of Ohio did not render an opinion.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1957. The time for filing a petition for certiorari was extended to July 20, 1957. The petition for certiorari was filed on July 19, 1957. The

jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was improperly denied a jury trial.

2. Whether the civil penalties provided for by the Agricultural Adjustment Act of 1938 for wheat produced on acreage in excess of a farm's wheat acreage allotment are constitutional as applied to excess production of a farmer who has not accepted any benefits under that Act and has not marketed any of his wheat in interstate commerce.[1]

STATUTE INVOLVED

Certain provisions of Sections 340, 375 and 376 of the Agricultural Adjustment Act of 1938, as amended, are set forth in the petition for certiorari (Pet. 3-8). The following provisions of Sections 363, 365, and 367 of said Act, as amended (respectively 7 U.S.C. 1363, 7 U.S.C. 1365, and 7 U.S.C. 1367), may also be relevant:

> Sec. 363. Any farmer who is dissatisfied with his farm marketing quota may, within fifteen days after mailing to him of notice as provided in section 362, have such quota reviewed by a

[1] The petition also presents the question: "Is a wheat penalty, as such, when sought by court proceedings a 'forfeiture of property' as set forth in Rule 81 of the Federal Rules of Civil Procedure?" We believe this question requires no detailed consideration since the petition makes no attempt to show that it was erroneously decided, and since it is fully answered in the opinion of the court of appeals (Pet. 15-17).

local review committee composed of three farmers from the same or nearby counties appointed by the Secretary. * * * Unless application for review is made within such period, the original determination of the farm marketing quota shall be final.

Sec. 365. If the farmer is dissatisfied with the determination of the review committee, he may, within fifteen days after a notice of such determination is mailed to him by registered mail, file a bill in equity against the review committee as defendant in the United States district court, or institute proceedings for review in any court of record of the State having general jurisdiction, sitting in the county or the district in which his farm is located, for the purpose of obtaining a review of such determination. * * *

Sec. 367. The commencement of judicial proceedings under this Part shall not, unless specifically ordered by the court, operate as a stay of the review committee's determination. Notwithstanding any other provision of law, the jurisdiction conferred by this Part to review the legal validity of a determination made by a review committee pursuant to this Part shall be exclusive. No court of the United States or of any State shall have jurisdiction to pass upon the legal validity of any such determination except in a proceeding under this Part.

STATEMENT

This action was instituted to recover the civil penalty imposed by the Agricultural Adjustment Act of 1938 on the petitioner's 1954 "farm marketing excess" of wheat. The complaint alleged that petitioner

had planted and harvested wheat in 1954 in excess of the wheat acreage allotment established for his farm, that he had not stored or delivered to the Secretary of Agriculture any part of such excess production, and that he had refused to pay the statutory penalty thereon amounting to $302.40 (R. 3a-6a).[2] The complaint also alleged that petitioner had not applied for a downward adjustment of his farm marketing excess or for an administrative review of the marketing quota or marketing excess determined for his farm (R. 4a-5a).

Petitioner, in his reply to interrogatories, admitted that he had received a notice of the 1954 farm marketing quota and farm marketing excess established for his farm, and that he did not after receipt of such notice apply for a review by a review committee of his farm marketing quota or farm marketing excess (Interrogatories 5, 7; R. 9a, 12a). The petitioner admitted that he had not paid the statutory penalty on such excess production, or delivered any part of such excess to the Secretary or his representative (Interrogatories 8-10, R. 9a-10a, 12a).

The district court granted the Government's motion for summary judgment, made upon the ground that there is "no genuine issue as to any material fact" (R. 14a-15a); and the court of appeals unanimously affirmed this judgment (Pet. 19).

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[2] All record references are to the appendix to petitioner's court of appeals brief.

ARGUMENT

1. The penalties imposed by the Agricultural Adjustment Act for production in excess of the marketing quota established for a farm "do not depend upon whether any part of the wheat, either within or without the quota, is sold or intended to be sold." *Wickard* v. *Filburn*, 317 U.S. 111, 119. Accordingly, petitioner's affirmative defense, that he had not marketed any part of his wheat in interstate commerce (see Pet. 13), raised an immaterial issue and laid no basis for trial by jury. Likewise, petitioner, insofar as he questioned the validity of the determination of his farm marketing quota, raised no issue proper for submission to a jury. Petitioner, having failed to pursue his administrative remedy respecting such determination, could not in the penalty suit attack the validity of the determination. See the opinion of the court below (Pet. 17-19).

2. Petitioner's principal contention is that the present case is distinguishable from *Wickard* v. *Filburn*, which upheld the constitutionality of the penalty imposed by the Agricultural Adjustment Act on wheat planted and harvested on acreage in excess of a farm's wheat acreage allotment. Petitioner urges (Pet. 11) that in *Wickard* the farmer was the moving party whereas here he is a defendant; that there the stipulated facts showed that the farmer sold part of his wheat and fed part of it to livestock, some of which was sold; and that there the farmer had previously accepted benefits under the Act.

The decision in *Wickard* did not rest to any degree on the factors urged as grounds of distinction. The

procedural basis of the proceeding was not deemed to limit the scope of the constitutional issues presented, the Court's opinion does not even mention past acceptance of benefits under the Act, and the actual disposition made of the crop was treated as irrelevant.[3]

There plainly is no valid distinction between the present case and *Wickard*, in view of the basis on which the Court there considered and decided constitutionality. The basis was that the quota fixed by the Agricultural Adjustment Act includes all the crop that the farmer may harvest, either "for sale or for his own farm needs," and that excess production "may neither be disposed of nor used" except on payment of the statutory penalty or by meeting the requirements of the Act as to storage or delivery to the Secretary of Agriculture. 317 U.S. 119.

The broad grounds upon which constitutionality was upheld were that Congress, under its commerce power, may regulate activity "if it exerts a substantial economic effect on interstate commerce" (*id.* 125); that a primary statutory purpose was to increase the market price of wheat, "and to that end to limit the volume thereof that could affect the market" (*id.* 128); that consumption on the farm has "a substantial influence on price and market conditions" because wheat so used supplies a need "which would otherwise be reflected by purchases in the open mar-

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[3] The facts before the Court respecting disposition related merely to what had been the farmer's "practice"; the Court said: "The intended disposition of the crop here involved has not been expressly stated." 317 U.S. 114.

ket" (*ibid.*); and that the fact that the production of a particular farmer "may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial" (*id.* 127-128).

At the 1956 Term, this Court denied a petition for a writ of certiorari which asked the Court to overrule *Wickard* v. *Filburn*. *Mumma* v. *United States*, 352 U.S. 1003.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1957.